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Legal Weed and the Non-Union Workplace Is Drug Testing a Risk Mitigation Option?

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LEGAL WEED AND THE NON-UNION WORKPLACE. IS DRUG TESTING A RISK MITIGATION OPTION?

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A) Introduction

Effective October 17, 2018, recreational cannabis use across Canada became legal.

With the formal removal of legal prohibitions, use is expected to increase. Employers are concerned about use and impairment during working hours, stemming from a sense of legal entitlement to use cannabis, in the same way that alcohol is consumed. The questions include:

- Will employees “smoke up” on breaks or at lunch and return to work stoned and unproductive?
- Will they drive and operate machinery in an impaired state, causing accidents and liability for employers?
- Will claims of addiction from users without medicinal cannabis prescriptions increase? Are such claims entitled to human rights protection?
- Do recreational users have any protection under Human Rights Legislation*?*
- Can employers prohibit cannabis use after hours?

Notwithstanding significant gaps in medical research, there is little room to dispute that cannabis consumption impairs cognitive and motor skills. There is, however, meaningful dispute and ambiguity about the nature, quality and window of impairment following cannabis use.

Employers are obligated to maintain a safe workplace. Drug testing is one potential solution to mitigate the risk of cannabis impairment.

In this paper, I examine the current status of drug testing in the non-union workplace and evaluate its viability for risk mitigation in this new era of legalized recreational cannabis use. I first outline the statutory framework concerning cannabis legalization, discuss the ambiguity associated with cannabis impairment and testing, and then examine the Ontario Court of Appeal’s seminal decision in *Entrop v. Imperial Oil*[1], which remains the most relevant and highest authority concerning drug testing in the non-union workplace. Following an analysis of key post *Entrop* developments, the paper concludes with some high level recommendations to assist in advising employers with respect to appropriate policy development. In the end, it is clear that drug testing should not represent the employer’s primary tool to mitigate the risk of cannabis related impairment in the workplace.

While the focus of the paper is the non-unionized workplace, key decisions from the unionized context are instructive, particularly with respect to the efficacy and intrusiveness of drug testing and the impairing qualities of cannabis.

[1] *Entrop v. Imperial Oil* (2000), O.R. (3D) 18

B) The Statutory Framework

Federal Legislation

Bill C-45, *The Cannabis Act* S.C. 2018, c. 16 received Royal Assent and became law on October 17, 2018. The Act legalizes the recreational use of cannabis in Canada and controls and regulates its production, distribution and sale.

The Act restricts legal usage to those 18 years of age or older and possession up to 30 grams. Individuals are permitted to grow up to four cannabis plants per household for personal use.[2]

The Federal Government is charged with setting industry-wide standards and rules for cannabis consumption including with respect to the types of cannabis products that are allowed for sale. The provinces and territories will be tasked with developing, implementing and enforcing various systems to oversee the sale and distribution of recreational cannabis.

Bill C-46, *An Act to Amend the Criminal Code* was developed to strengthen police powers regarding impaired driving. Police will have the power to demand oral fluid samples at roadside checks if impairment is suspected.[3]

The Canadian Government website states the following with respect to Bill C-46:

> "Bill C-46 proposes to supplement the existing drug-impaired driving offence by creating three new offences for having specified levels of a drug in the blood within two hours of driving. The penalties would depend on the drug type and the levels of drug or the combination of alcohol and drugs. The levels would be set by regulation."[4]

Bill C-46 sets specific limits for the amount of THC that an individual can have in their blood while driving, which is measured in nanograms. Low levels may not result in criminal charges, but may result in punishment in the form of a fine. A driver with more than 5 nanograms of THC in their system may be subject to criminal sanctions such as imprisonment for repeat offenders.

Ontario Legislation

The distribution of cannabis will be the responsibility of the Provincial Government.

Bill 174, the *Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act 2017* consists of four schedules:

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[2] http://www.justice.gc.ca/eng/cj-jp/cannabis/.
[3] http://www.justice.gc.ca/eng/cj-jp/sidl-rlcfa/c46/p3.html.
[4] http://www.justice.gc.ca/eng/cj-jp/sidl-rlcfa/c46/p3.html.

a) Schedule 1

Schedule 1 enacts the *Cannabis Act,* 2017*, S.O. 2017, c. 26*[5] which sets the minimum age to use, purchase, possess and grow cannabis in Ontario at 19. This legislation prohibits the use of recreational cannabis in the following areas:

- Public places;
- Workplaces (broadly defined in the *Occupational Health and Safety Act* , R.S.O. 1990, c. O.1); or,
- Inside a vehicle.

b) Schedule 2

Schedule 2 establishes the Ontario Cannabis Retail Corporation, which has the exclusive right to sell cannabis in Ontario.

c) Schedule 3

Schedule 3 repeals the *Smoke-Free Ontario Act* and the *Electronic Cigarettes Act* 2015 and replaces them with the *Smoke-Free Ontario Act, S.O. 2017, c. 26*. This legislation applies to tobacco, vapour products, medical cannabis and other prescribed products and substances. Pursuant to this legislation, smoking or vaping is prohibited in various areas including enclosed workplaces. Under the legislation, enclosed workplaces are defined as follows:

(a) the inside of any place, building, structure, vehicle or conveyance or part of any of them,

(i) that is covered by a roof,
(ii) that employees work in or frequent during the course of their employment whether or not they are acting in the course of their employment at the time, and
(iii) that is not primarily a private dwelling, or

(b) a prescribed place[6]

Section 12 of Bill 174 states that, subject to certain exemptions, no person shall do the following in prohibited places outlined in subsection 2, including enclosed workplaces:

- Smoke or hold lighted tobacco
- Smoke of hold lighted medical cannabis
- Use an electronic cigarette

[5] https://www.ontario.ca/laws/statute/17c26
[6] https://www.ontario.ca/laws/statute/17s26

- Consume a prescribed product or substance in a prescribed manner

d) Schedule 4

This schedule amends the *Highway Traffic Act* to make impaired driving laws in Ontario more strict. This includes a zero tolerance for drivers under 22 years of age, novice drivers (those holding a G1,G2,M1 or M2 licence) or those who operate commercial vehicles.

Bill 36, the Cannabis Statute Law Amendment Act, 2018, was introduced by the Ontario government on September 27, 2018. It is currently being considered by the Standing Committee on Social Policy. If passed, Bill 36 will amend the Cannabis Act, 2017 (renaming it the Cannabis Control Act, 2017), the Ontario Cannabis Retail Corporation Act, 2017, the Liquor Control Act, the Smoke-Free Ontario Act, 2017 and the Highway Traffic Act. It will also enact the Cannabis Licence Act, 2018.

Importantly, Bill 36 proposes to repeal the prohibitions with respect to the areas where medical and recreational cannabis can be consumed. The Bill will effectively allow individuals to consume cannabis in any public or private area where smoking tobacco is permissible under the Smoke-Free Ontario Act, 2017. As such, smoking or consuming cannabis vapour products will not be permitted in enclosed public spaces or workplaces, the indoor areas of condos and apartment buildings, residences within universities and colleges, and in non-smoking rooms of hotels, motels or inns.

Bill 36 will significantly impact the ability of Ontario employers to control the use of recreational cannabis during the workday as it will allow employees greater opportunity to legally consume cannabis on their breaks. This underscores the need for employers to develop appropriate policies restricting the use of cannabis during work hours.

Significantly, nothing in the new provincial legislation prohibits or restricts cannabis impairment in the workplace. This function is left to the employer's general and other statutory obligations to ensure a safe workplace.

Under the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 ("*OHSA*"), an employer has a duty to provide a safe workplace as well as information, instruction and supervision to a worker to protect the health and safety of the worker(s). Employers must also ensure that they are compliant with human rights legislation. Employees have a corresponding duty to perform work safely and to report any hazards to their supervisors or employer.

Section 25 of the *OHSA sets* out the duties of Ontario employers. According to 25(2)(h), an employer is required to take every precaution reasonable in the circumstances for the protection of a worker. This involves identifying and controlling risks and hazards.

Employers are obligated to ensure that workers are not impaired while performing job related duties, particularly in safety sensitive roles. They must also ensure that other workers

are not exposed to hazards as a result of impairment caused by the use of substances including marijuana.

C) Uncertainty with Cannabis Impairment

There is little debate that cannabis does impair functioning. There does appear, however, to be a lack of consensus with respect to the biochemical sources of impairment and the extent, signs and length of impairment across individuals.

The main psychoactive component of cannabis is Delta-9-tetrahydrocannabinol or THC for short. Health Canada has identified the following effects of THC:

- disorientation, confusion, feeling drunk, feeling abnormal or having abnormal thoughts, feeling "too high", feelings of unreality, feeling an extreme slowing of time;
- suspiciousness, nervousness, episodes of anxiety resembling a panic attack, paranoia (loss of contact with reality), hallucinations (seeing or hearing things that do not exist).
- Impairment of motor skills, and perception, altered bodily perceptions, loss of full control of bodily movements, falls;
- Dry mouth, throat irritation, coughing;
- Worsening of seizures;
- Hypersensitivity (worsening of dermatitis or hives);
- Higher or lower blood levels of certain medications;
- Nausea, vomiting; and,
- Fast heartbeat. [7]

Inhalation of cannabis products may cause psychoactive effects within a few minutes, which generally peak within 30 minutes. Acute effects may last from 2-4 hours or even up to 24 hours. Oral consumption of cannabis products may cause acute effects within 30 minutes or produce a delayed response 3 to 4 hours after administration. These effects peak between 3 to 4 hours after consumption and can last anywhere from 8 hours to 24 hours. [8]

There is a lack of empirical evidence on the issue of impairment caused by cannabis. Studies do suggest, however, that long-term users of cannabis experience less impairment from THC than infrequent users.[9] The American College of Occupational and Environmental Medicine found that:

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[7] https://www.canada.ca/en/health-canada/services/drugs-medication/cannabis/health-effects/effects.html

[8] Canadian Centre for Occupational Health and Safety, Workplace Strategies: Risk of Impairment from Cannabis. Available at https://www.ccohs.ca/products/publications/cannabis_whitepaper.pdf

[9] https://www.ccohs.ca/products/publications/cannabis_whitepaper.pdf at page 5.

> "The majority of studies of impairment related to driving and cognition show return to a generally nonimpaired state within 3-6 hours after smoking cannabis among occasional recreational users."[10]

While there is no consensus on the length of cannabis impairment, there have been studies that suggest that in heavy users the substance can effect cognitive performance for up to 28 days.[11] The claim is controversial.

The United Kingdom's National Health Service in 2016 used urine samples for THC to determine that an occasional/first-time-user would likely test positive for up to four days after last using, while a frequent user would likely test positive for up to ten days after last using and a heavy user could test positive up to two months after last using.[12]

The State of Colorado recommends that drivers wait at least 6 hours before driving after smoking cannabis and at least 8 hours if cannabis is ingested. Canada does not have a similar standard rule of thumb with respect to cannabis and driving.

Another component of cannabis is cannabidiol, or "CBD".

The general consensus appears to be that CBD does not produce a psychoactive effect. This conclusion does not, however, appear to be universally accepted. CBD is the non-psychoactive component of cannabis. It is used for a variety of therapeutic purposes including the treatment of chronic pain and seizures. Some strands of CBD also contain THC. There is considerable uncertainty regarding the effects of CBD on cognitive function. Studies to date suggest that it is not possible to definitively state that CBD has no impairing effects. In high doses, CBD has been found to cause drowsiness, a drop in blood pressure, and light-headedness.[13]

Arbitrators have struggled with how to manage the ambiguity concerning the impairing effects of cannabis.

Airport Termination Services Canadian Company v. UNIFOR, Local 202 ("ATS")[14] is a recent federal arbitral decision highlighting the problems associated with the uncertainty surrounding the issue of cannabis impairment.

The grievor in ATS was employed as a ramp agent at Pearson International Airport. His duties, considered safety sensitive, involved aiding the preparation of aircraft for departure and disembarkation. The grievor's failure to follow procedure was partly responsible for a

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[10] ACOEM Guidelines, Marijuana in the Workplace: Guidance for Occupational Health Professionals and Employers. Available at: https://www.acoem.org/uploadedFiles/Public_Affairs/Policies_And_Position_Statements/Guidelines/Guidelines/Marijuana%20JointGuidance%202015.pdf

[11] *Supra*, Note 9.

[12] https://www.ccohs.ca/products/publications/cannabis_whitepaper.pdf at page 6.

[13] https://www.webmd.com/vitamins/ai/ingredientmono-1439/cannabidiol

[14] 2018 CanLii 34078 (CA LA)

workplace accident that damaged an aircraft. The accident caused a departure delay, but no injury. The grievor was required to submit to a drug and alcohol test which came back positive for cannabis metabolites.

The grievor was prescribed to smoke or vaporize cannabis to manage a chronic back injury daily before and after work. He smoked or vaporized between 2 and 4 grams daily depending on his level of pain. His consumption occurred immediately after work and his last consumption was a minimum of 12 hours prior to his shift.

The two doctors called as witnesses disagreed on whether or not the grievor could be impaired for his shift. One doctor, relying on one set of research, testified that impairment could last up to 24 hours, particularly given the amount of cannabis the grievor consumed. The other doctor, relying on another set of valid research, testified that the window of impairment for cannabis was 4-8 hours after use. In that context, the grievor's consumption of 3-4 grams of marijuana would have no lingering impairing effects during the following day's shift.

Arbitrator Randazzo found that there was no evidence of impairment at the time of the workplace accident. Nevertheless, he was troubled by the lack of control surrounding the grievor's use of cannabis given the safety sensitive nature of his position. Among various concerns, the grievor had not been medically examined since he received his prescription 3 years prior and there were no efforts to titrate the dose and strain of the cannabis he was consuming. The grievor himself had "no idea of the strain or strength of the medical marijuana he was taking".[15] Commenting on the scientific evidence, the Arbitrator observed:

> *"…the expert evidence and literature are inconclusive when it comes to determining the window of impairment which varies depending on the strain, dosage and the user and as such, extreme caution should be taken when an employee is taking medicinal marijuana in a safety sensitive workplace"*[16]

In a recent arbitration decision out of Newfoundland, *Re. Lower Churchill Transmission Construction Association Inc. and IBEW Local 1620*[17], an arbitrator found that the uncertainty associated with the window of impairment following cannabis use the evening before a shift relieved the employer's accommodation obligation.

The grievor, who consumed up to 1.5 grams of cannabis in the evenings following work for pain management purposes, sought a safety sensitive labour position with his employer. The expert medical evidence revealed no consensus regarding the window of impairment. Combined with the absence of reliable testing mechanisms for cannabis impairment, the arbitrator found that accommodation of the grievor in these circumstances would represent undue hardship:

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[15] *Ibid*, Par. 30
[16] *Ibid*
[17] 2018 CarswellNfld 198

"The safety hazard that would be introduced into the workplace here by residual impairment arising from the Grievor's evening use of cannabis products could not be ameliorated by remedial or monitoring processes. Consequently, undue hardship, in terms of unacceptable safety risk, would result to the Employer if it put the Grievor to work. As previously stated, if the Employer cannot measure impairment, it cannot manage risk."[18]

A recent decision of Ontario Human Rights Tribunal provides a clear indication of how the Tribunal may address the question of impairment in the context of cannabis use during work hours.

In *Aitchison v. L&L Painting & Decorating Ltd*[19], the applicant was dismissed after being caught smoking marijuana on a swing stage suspended 37 stories above ground. The applicant admitted to smoking 2 joints during his breaks to manage pain related symptoms. The applicant appeared to have a questionable prescription for marijuana and the evidence did not indicate that he had a cannabis addiction. One of the Applicant's arguments was that there was no evidence of actual impairment in relation to his work related functions. The Tribunal held that such evidence was unnecessary given the Applicant's admission of use during his shift, the incontrovertible fact that cannabis does impair and the employer's safety sensitive operation:

The applicant does not have an absolute right to smoke marijuana at work…[20]

His actions represented a genuine health and safety risk given the safety sensitive nature of the job site. At risk of repeating myself, I cannot emphasize enough that the applicant worked on the 37th floor of the office tower on the outside of the building. If the applicant was impaired even in the slightest and it resulted in an accident, such as him dropping a tool, the consequences would be catastrophic.[21]

I do not accept the applicant's claim that there must be actual evidence of impairment before the respondent can take action. By his own admission, the applicant smoked two grams of cannabis throughout the workday. According to Dr. Price, patients are instructed not to drive a vehicle for at least two [hours] after medicating, due to the euphoric effects of the drug and the impairment to the users' motor skills and response time.[22]

Notwithstanding any ongoing ambiguity surrounding the window of impairment associated with cannabis use, there is no ambiguity about the extent of impairment when cannabis is used while working on jobs that are safety sensitive.

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[18] *Ibid*, Page 60
[19] 2018 HRTO 238
[20] *Ibid*, Par. 165
[21] *Ibid*, Par. 166
[22] *Ibid*, Par. 168

D) The Problem with Testing

Despite advances in recent years, there are presently no accurate and complete tests for cannabis impairment. Current testing methods may only reveal recent use and *possible* impairment. Alcohol breathalyzer testing stands on a completely different footing – its accuracy and validity for testing current alcohol impairment is accepted.

In the criminal law context, some police forces may administer oral fluid tests to drivers who are suspected to be under the influence. This test will be able to detect the presence of THC in saliva, but not THC impairment, the quantity consumed or the time of usage. It is, therefore, not an accurate test for cannabis impairment. Indeed, saliva tests have been shown to produce a higher number of false positives and false negatives.[23]

Police have also used a functional ability test (field sobriety test) to observe functioning and motor skills. This type of testing is susceptible to bias and error.

Urine tests can detect small amounts of THC in an individual's system several weeks after use. Again, this is not a very helpful test for impairment.

While a blood test may also be administered at a police station, researchers have found that elevated blood THC levels do not always mean impairment.[24]

Testing for impairment is highly individualized as it differs from person-to-person based on their tolerance and frequency of usage.

The concern is highly relevant when it comes to testing in the workplace.

E) Drug Testing in the Non-Union Workplace- *Entrop* Decision

Consideration of the Ontario Court of Appeal's 2000 decision in *Entrop v. Imperial Oil*[25] remains central to understanding the non-union employer's ability to implement workplace drug testing. The decision underlies the significance of drug testing from a human rights standpoint and is the foundation of the *Ontario Human Rights Commission's* Policy on Drug Testing.[26]

In 1992, Imperial Oil implemented a comprehensive drug and alcohol testing policy at its Ontario oil refineries. Employees in safety sensitive positions would be subject to

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23 Canadian Centre for Occupational Health and Safety, Workplace Strategies: Risk of Impairment from Cannabis. Available at https://www.ccohs.ca/products/publications/cannabis_whitepaper.pdf

24 https://www.cbc.ca/news/canada/edmonton/doug-beirness-cannabis-impaired-driving-alberta-1.4403507

25 *Supra*, Note 1

26 http://www.ohrc.on.ca/en/policy-drug-and-alcohol-testing-2016; see also the Commission's Statement on Cannabis and the Human Rights Code, updated in October 2018 http://ohrc.on.ca/en/policy-statement-cannabis-and-human-rights-code

unannounced random alcohol and drug testing as a means of deterring impairment at work. A positive test resulted in termination of employment. Further, the policy required mandatory disclosure of a current or past substance abuse problem which would result in reassignment to a non-safety sensitive position with reinstatement to the former role under strict conditions of rehabilitation, abstinence and compliance with ongoing testing protocols.

Martin Entrop, a non-unionized employee, disclosed that he suffered from alcohol abuse in the 1980s but had been abstinent in the 7 years prior to the test. In accordance with the policy, Mr. Entrop was reassigned to a non-safety sensitive position. He filed a complaint with the Ontario Human Rights Commission alleging discrimination on the basis of handicap. Imperial Oil amended its policy allowing Mr. Entrop to be reinstated, subject to several conditions, including unannounced breathalyzer tests.

The Court of Appeal considered whether: (1) Imperial Oil's alcohol and drug testing policy was *prima facie* discriminatory; and (2) if so, whether or not the testing provisions could be justified as a bona fide occupational requirement under the Supreme Court of Canada's decision in *Meiorin.*[27]

Prima Facie Discrimination

The Court recognized that the definition of "handicap" under the Code included persons who suffered from a handicap, which included substance abuse, as well as individuals "believed to have a handicap, whether they did or not".

Imperial Oil's policy administered an adverse consequence for anyone testing positive on a pre-employment or random drug test, or a pre-employment or random alcohol test. The sanctions could include a refusal to hire, discipline or termination. These sanctions applied to the social drinker or casual drug user as well. As such, and in effect, the recreational user was perceived by the employer to have a substance abuse handicap and it was assumed that the person would likely be impaired at work and not fit for duty. As the Court held:

> *"Thus, though the social drinker and casual drug user are not substance abusers and, therefore, not handicapped, Imperial Oil believes them to be substance abusers for the purpose of the policy. In other words, Imperial Oil believes that any person testing positive on a pre-employment drug test or a random drug or alcohol test is a substance abuser. Because perceived as well as actual substance abuse is included in the definition of handicap under the Code, anyone testing positive under the alcohol and drug testing provisions of the policy is entitled to the protection of s. 5 of the Code (92)."*[28]

[27] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 (S.C.C.)
[28] *Ibid*, Par. 92

Bona Fide Occupational Requirement

The Court considered whether or not Imperial Oil's drug and alcohol policy could be considered a BFOR in accordance with *Meiorin*. Under this test, a BFOR is established where:

i. A discriminatory standard is adopted for a purpose rationally connected to the performance of the job;

ii. The discriminatory standard was adopted in an honest and good faith belief that it was necessary to accomplish the company's stated and legitimate purpose; and

iii. The standard was reasonably necessary to achieve the employer's purpose. In this respect, it must be shown that it would be impossible to accommodate the employee affected by the discriminatory standard without causing undue hardship to the employer.

Imperial Oil satisfied the Court of Appeal that its alcohol and drug testing policy was rationally connected to its legitimate objective of ensuring safety at its inherently dangerous oil refineries. Imperial Oil adopted the policy in an honest and good faith belief that it was necessary to accomplish its objectives concerning plant safety.

Applying the third branch of the *Meiorin* test, the Court found that the drug testing policy was not reasonably necessary, but the alcohol policy could be, with provisions for individual accommodation.

There were two problems with drug testing that negated its reasonable necessity.

First, urinalysis was not capable of determining present impairment from drugs. The test showed drug metabolites in a person's blood, but this only meant that the drug had been used sometime in the past. The test did not measure how much was used or when. Accordingly, the test had no predictive value in determining the likelihood of impairment on the job.

Imperial Oil sought to argue that its policy necessitated the requirement that an employee or prospective employee have "*no presence*" of drugs or their metabolites in his or her blood. The Court rejected this is as arbitrary on the basis that *"a positive drug test does not demonstrate incapability to perform the work safely*".[29]

Secondly, the sanction for a positive test was too severe and more stringent than necessary to ensure safety in the workplace. Although employees in non-safety sensitive positions could receive a range of disciplinary responses, safety sensitive employees would only face termination of employment with no possibility of accommodation. According to the Court,

[29] *Ibid*, Par. 105

"*automatic termination of employment for all employees after a single positive test is broader than necessary*".[30]

The Court held differently with respect to Imperial Oil's alcohol testing policy. Breathalyzer testing for alcohol *was* a reliable indicator of current impairment. In the context of Imperial Oil's highly safety sensitive environment where supervision was limited or non-existent, random alcohol testing was reasonably necessary, but only to the extent that individual accommodation of employees who test positive was available. This included the consideration of remedial sanctions less severe than dismissal.

F) Significance of *Entrop* for Cannabis Impairment

Entrop suggests the following key implications with respect to the lawfulness of testing recreational users of cannabis for non-unionized employment purposes:

1. Pre-employment drug testing that denies a person employment because of the presence of THC or CBD metabolites in his or her blood is *prima facie* discriminatory. Such a policy assumes that the person, whether or not disabled by addiction, will present to work impaired, unfit for duty and unable to perform the duties of the position. The policy thus perceives the individual to be disabled.

2. Random drug testing, for the same reasons, would be considered *prima facie* discriminatory. The employer, in administering an adverse consequence to the employee, perceives him or her to be disabled by addiction or substance abuse, whether or not he or she is.

3. To the extent that pre-employment or random drug testing cannot detect present impairment, it cannot ascertain a present or future risk to safety. Such testing is, therefore, not reasonably necessary to achieving the objectives of safety.

In accordance with these principles, the Ontario *Human Rights Commission*[31] recommends as follows with respect to workplace drug testing:

Testing Situation	Recommendation
Pre-Employment	Against
Random Drug Tests	Against
Reasonable Grounds and Post-Incident Testing	Permissible in certain circumstances: • Safety sensitive work • Part of a larger assessment

[30] *Ibid*, Par. 102
[31] See Commission's Policy on Alcohol and Drug testing http://www.ohrc.on.ca/en/policy-drug-and-alcohol-testing-2016

	• Duty to accommodate is met • Reasonable basis for suspecting impairment
Component of rehabilitation plan	Permissible in certain circumstances: • Safety sensitive work • Individual accommodation needs are assessed • Testing periods are reasonable and not overly intrusive.

G) Notable Cases Since *Entrop*

a. Imperial Oil's Second Kick at the Can – the Nanticoke Decision[32]

In the aftermath of the Ontario Court of Appeal's decision in *Entrop* rejecting the use of pre-employment and random drug testing, Imperial Oil persisted in its efforts to mitigate the risk of drug impairment at its oil refineries.

Imperial Oil sought out new drug testing technologies in an effort to test current impairment in the workplace, which urinalysis was incapable of doing. It settled on saliva testing which involved the use of a swab inside of an employee's mouth. The swab was then sent to a lab for testing and the results were communicated several days later. In the meantime, the tested employee, who may have been impaired, continued to work. Armed with the new technology, Imperial Oil resumed random drug testing at its unionized facility in Nanticoke, Ontario. The union grieved.

The Board of Arbitration upheld the for cause, post-incident and rehabilitation testing provisions of the new drug policy. It struck down the random drug testing provisions of the policy as a violation of the collective agreement, finding a breach of the "respect and dignity" protections under the collective agreement. This breach was not outweighed by the safety risk presented by drug impaired workers, which the Board found to be speculative. The Board's chief concern was the fact that while the *results* of the oral swab test may indicate impairment at the time that the swab was taken, the test itself did not provide any indication of impairment at the time it was taken. As a result, the Board found that the objective of the test was less about workplace safety and more about identifying policy violatory and general deterrence.

Significantly, the arbitration board did not consider the *Human Rights Code* in its decision, relying solely on collective agreement and arbitral principles. Imperial Oil had no success overturning the arbitration decision before the Divisional Court and, subsequently, the

32 *Imperial Oil v. CEP, Local 900* (2009), 96. O.R.(Ed) 668 (C.A.)

Ontario Court of Appeal. Both Courts agreed that the arbitration board was not obliged to consider the *Code* given collective agreement protections for privacy and dignity.

Imperial Oil's saliva drug test has not been tested under the *Code*. Nevertheless, the dignity and privacy concerns that are identified in *Nanticoke* would be relevant considerations under the reasonable necessity analysis of *Meiorin*. Insofar as an oral swab test does not provide immediate evidence of impairment at the time of the test, it would appear difficult to justify as reasonably necessary and therefore a *bona fide occupational requirement*. Moreover, given the ongoing concerns and uncertainty reflected in arbitral decisions with respect to the ability of drug testing to test for current impairment, it does not appear that oral swab testing is the answer to the question.

b. Narrowing Notion of Perceived Disability?

The foundation of *Entrop* and the OHRC's policy against pre-employment and random drug testing stems from the belief that such testing is *prima facie* discriminatory on the basis of disability or perceived disability.

Protection for recreational users derives from the principle that a positive test is indicative of a future inability to perform the duties of the position safely. Thus, in effect, recreational users who test positive are treated as though they have a disability.

Cases subsequent to *Entrop* have called into question the applicability of the concept of perceived disability.

In 2003, in *Milazzo v. Autocar Connaisseur Inc.*[33], the Canadian Human Rights Tribunal held that a recreational user of cannabis who was summarily terminated after failing a random drug test was not perceived to be disabled. Rather, "he was fired because he failed his drug test….[and] no one…knew, or cared, whether Mr. Milazzo was dependent on drugs". The Tribunal did not appear to consider the Ontario Court of Appeal's reasoning that the *effect or application* of a zero tolerance drug policy is what creates a perception of disability.

The 2007 Ontario Divisional Court decision in *Weyerhaeuser Company Limited cob Trus Joist v. Alan Chornyj*[34] is notable for its consideration of the issue. In a judicial review of a preliminary decision of the Ontario Human Rights Tribunal, the Divisional Court considered whether a prospective employee, Alan Chornyj, who had tested positive for cannabis use could claim discrimination on the basis of perceived disability. Mr. Chornyj did not claim that he was addicted to cannabis, only that he had used it occasionally, for recreational purposes.

The Divisional Court held that the Tribunal ought to have dismissed Mr. Chornyj's claim of discrimination on the basis of perceived disability on a preliminary basis for two key reasons.

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[33] 2003 CHRT 37

[34] 2007 CanLii 65618 (ON SCDC)

First, there was no evidence that Weyerhauser denied Mr. Chornyl employment because they perceived him to be a cannabis abuser. The employer's evidence was that when its representative asked Mr. Chornyj if he used marijuana after the positive test result, he denied doing so and later admitted to using it occasionally. As such, the employer perceived Mr. Chornyl to be dishonest and that was the reason for rejecting him for employment.

Second, the effect of the drug policy was not *prima facie* discriminatory, as it was in the *Entrop* case. Under Weyerhauser's policy, a positive drug test did not automatically lead to dismissal or a revocation of an offer of employment. Following a positive drug test, Weyerhauser provided an opportunity to re-test and sign a "commencement of duty agreement" that imposed conditions for continued employment. As such, the Court found that there was no evidence that Weyerhauser perceived any person who tested positive on a drug test to be disabled by drug dependency.

Alberta jurisprudence demonstrates a less tolerant approach towards recreational use and, particularly, the notion of perceived discrimination, as demonstrated in the 2007 Court of Appeal decision *Alberta (Human Rights and Citizenship Commission) v. Kellogg Brown & Root*[35].

John Chiasson was fired shortly after starting work for Kellogg Brown & Root when his pre-employment drug test revealed cannabis metabolites. Mr. Chiasson claimed to have smoked marijuana five days prior to his test and assumed that it had cleared his system by the time of the test. He was a recreational marijuana user. He claimed discrimination on the basis of perceived disability, which was rejected by Alberta's human rights tribunal. However, the Alberta Court of Queen's bench overturned the decision on judicial review. The judge found, consistent with *Entrop*, that the *effect* of KBR's inflexible, zero tolerance policy was to treat recreational users, like Mr. Chiasson, as if they were addicted to cannabis.

The Alberta Court of Appeal overturned the lower court, reasoning that the effects of cannabis use can linger for several days and impair functioning in a safety sensitive environment. The policy was intended to mitigate the risk of workplace accidents by prohibiting drug impairment. It was aimed at the actual effects suffered by cannabis users, not the perceived effects suffered by cannabis addicts. The Court declined to follow the reasoning in *Entrop*. As the court held:

> "*KBR's policy does not perceive Chiasson to be an addict. Rather it perceives that persons who use drugs at all are a safety risk in an already dangerous workplace*".[36]

By analogy, according to the Court, KBR's policy was no different than a trucking or taxi company that requires employees to refrain from the use of alcohol before operating a vehicle. Such a policy does not mean that the company perceives its drivers to be alcoholics.

[35] 2007 ABCA 426 (CanLii)
[36] *Ibid*, Par. 34

Rather, it perceives that any level of alcohol in a driver's blood reduces his or her ability to operate the vehicle safely.

The Divisional Court's decision in *Weyerhauser* seems reconcilable with *Entrop* to the extent that the prospective employee was denied employment because he was dishonest about his cannabis use. Had he been forthcoming, the employer may have found a solution to employ him under its policy that did not purport to be "zero tolerance".

On the other hand, the decision in *KBR* does not appear persuasive. The Alberta Court of Appeal appears to assume that *any* degree of cannabis metabolites will have an impairing effect, which is not correct. The Court's analogy to blood-alcohol concentration levels appears to incorrectly conflate the effects of cannabis impairment with alcohol impairment.

It seems unlikely that the concept of perceived disability, as applied in *Entrop*, would be varied or modified by consideration of *KBR*.

c. Supreme Court of Canada – Irving and Elk Valley Decisions

The Supreme Court of Canada weighed in on the drug and alcohol testing conundrum in 2013 and 2017. Though decided in the context of the unionized workplace, both decisions have unquestionable relevance to testing and policy considerations in the non-unionized environment.

i) Irving[37]

Irving concerned the enforceability of a random alcohol policy in a unionized workplace as a valid exercise of management rights. As such, the decision does not apply human rights principles and the Supreme Court expressly declined to consider *Entrop.* In *Irving*, the Supreme Court found that the employer's random alcohol policy represented an unjustifiable intrusion into employee privacy and dignity. The employer's evidence of eight (8) incidents of alcohol consumption over a 15 year period was not sufficient to justify the intrusion.

The Supreme Court did not say that an employer could *never* justify a random alcohol policy in its workplace. However, significantly more than eight incidents of alcohol use in 15 years would be needed to demonstrate an "out of control" culture of substance abuse.

The management rights analysis that was applied in *Irving* is not applicable in the non-unionized workplace. Nevertheless, the analysis does involve a balancing and proportionality analysis that weighs the benefits of a drug and alcohol testing policy against the privacy and dignity interests of employees. This is analogous to the *Meiorin* BFOR analysis that evaluates the employer's objectives and intentions and the reasonably necessity of an employer's rule against its discriminatory impact. A recent arbitral decision by Arbitrator Surdykowski recognized the parallels between the *Irving* analysis and the *Entrop* framework, as follows:

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[37] *CEP, Local 30 v. Irving Pulp & Paper, Limited* [2013] 2.S.C.R. 458 ("Irving")

> *"If the 3-step test is met, the workplace rule or policy is a BFOR. In most cases today, the third step of the Meiorin test is the only one seriously in issue. The third step requires an employer to justify a prima facie discriminatory workplace standard, rule, or policy by establishing on a balance of probabilities that it is reasonably necessary to accomplish a legitimate work-related purpose, which typically includes demonstrating that it is impossible to accommodate employees on an individualized basis without undue hardship. (Entrop Court of Appeal decision paragraph 75.) <u>This is analogous to the collective agreement management rights requirement articulated by the Supreme Court of Canada in Irving Pulp & Paper, Ltd. Although the accommodation requirement may appear to add a significant layer to the analysis, it does not seem to me to be terribly different in principle to the requirement that the rule or policy response to a failed or refused alcohol or drug test be non-automatic and that the disciplinary or other employer response be individualized to the particular circumstances</u>."*[38]

Given these parallels, *Irving* reasonably suggests that employers, particularly in the absence of testing mechanisms that are as valid or reliable as breathalyzers, have a significant uphill battle in justifying the implementation of random drug testing in *any* workplace.

ii) Elk Valley[39]

The Supreme Court of Canada's recent decision in *Elk Valley* is likely to have significant implications with respect to recreational cannabis users and the workplace. The decision will assist employers in separating users who may require accommodation for cannabis addiction versus recreational users who wilfully choose not to comply with an employer's substance use policies.

Ian Stewart worked in a coal mine for Elk Valley Coal Corporation driving a "loader". The position and workplace was highly safety sensitive. To ensure the safety of the mine, Elk Valley implemented an "Alcohol, Illegal Drugs and Medication" policy (the "Policy"). Under the policy, employees were expected to disclose any dependency or addiction issues. If disclosure was made, Elk Valley would offer treatment. Absent disclosure, a positive test for drugs would result in termination of employment.

Mr. Stewart used cocaine on his days off and did not disclose this fact to Elk Valley. Following an accident, Mr. Stewart was required to undergo a mandatory post-accident drug test and tested positive for drug metabolites. Mr. Stewart disclosed that he believed he was addicted to cocaine. He was subsequently terminated for violating what Elk Valley called the "no free accident" rule.

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[38] *Mechanical Contractors Association Sarnia v United Association of Journeymen and Apprentices Of The Plumbing & Pipefitting Industry of the United States and Canada, Local 663*, 2013 CanLII 54951 (ON LA)

[39] *Stewart v. Elk Valley Coal Corp.* [2017] 1 S.C.R. 591 ("Elk Valley")

Mr. Stewart's union grieved on his behalf, advancing the position that his drug addiction was a disability and that he was terminated because of his addiction. Accordingly, the union alleged that he was discriminated against on the basis of disability.

The Human Rights Tribunal held, at first insistence, that Mr. Stewart was not dismissed because of his addiction, but because he breached the Policy that required him to disclose his addiction or dependency before an accident occurred. There was no *prima facie* discrimination on the basis of disability.

The Supreme Court of Canada upheld the Tribunal's decision.

Although Mr. Stewart had an addiction and suffered an adverse consequence by being dismissed, his addiction was not a factor in the decision to terminate his employment. Indeed, Elk Valley's termination notice specified that it was his breach of the Policy in failing to disclose his drug addiction that resulted in termination. Although addiction may result in denial behaviours, the evidence before the Tribunal was that Mr. Stewart was not disabled from being able to comply with the Policy.

The Court held:

> *Where, as here, a tribunal concludes that the cause of the termination was the breach of a workplace policy or some other conduct attracting discipline, <u>the mere existence of addiction does not establish prima facie discrimination</u>. If an employee fails to comply with a workplace policy for a reason related to addiction, the employer would be unable to sanction him in any way, without potentially violating human rights legislation.*[40]

Elk Valley should serve to be a helpful tool to employers in addressing employee challenges to discipline for cannabis use. Claims of cannabis addiction are likely to arise as excuses for violating a variety of workplace rules. *Elk Valley* suggests that the fact of addiction does not necessarily justify misconduct or the inability to comply with workplace rules. Nevertheless, employers must take care to ensure that each claim of addiction is evaluated on a case by case basis. While not every claim of addiction results in discrimination, employers must not ignore the depth and complexity of addiction issues and the need to investigate and implement reasonable forms of accommodation in response to every substance abuse claim.

d. Limitations of Post Incident Testing

Recent arbitrations highlight the limitation of testing, even in post-incident or near miss situations where testing has been customarily allowed.

In *ATS*[41], discussed above, Arbitrator Randozzo was critical of the employer's policy requiring, in a mechanical fashion, a drug or alcohol test after any and all accidents or incidents. On the

[40] *Ibid*, Par. 42
[41] *Supra*, Note 14

facts of ATS, the grievor had tested positive for cannabis metabolites after a workplace accident caused, in part, by the grievor's failure to follow procedure. The Arbitrator was critical of the employer's sole reliance on testing to investigate the cause of the incident. Instead, with greater consideration for the grievor's privacy interests and what appeared to be relatively minor consequences from the accident, the employer was not justified in resorting to invasive drug testing as a first step. Under the circumstances, the employer ought to have first interviewed the grievor with respect to the cause of the incident. Nevertheless, testing was justified in the circumstances given the grievor's prior cannabis possession at the workplace.

A recent Newfoundland Court of Appeal decision affirming an arbitrator's decision to reinstate an employee who tested positive for drugs after a safety related incident in the workplace is also instructive on this point.

In *Re Hibernia Platform Employers' Organization and CEP*[42] the grievor was summarily terminated after he tested positive for benzodiazepines. The test was administered following several "significant incidents", which triggered an investigation and the employer's application of drug testing. The termination was set aside, in part, because the employer did not conduct an adequate investigation to determine if there was a reasonable basis to connect possible substance abuse to the incident in question.

In the unionized context, post incident drug testing is not automatically justified in the absence of any preliminary investigation of the circumstances of the incident. With the uncertainties associated with cannabis impairment and the validity and efficacy of testing tools, this principle is likely to be valid in the non-unionized workplace as well. Specifically, post-incident testing to detect cannabis use is unlikely to be found to be reasonably necessary where there are explanations for an accident or incident that have no reasonable connection to substance impairment. In most cases, at least some preliminary investigation will be necessary before a drug test is administered.

H) Conclusions

There are, admittedly, more questions than answers surrounding the impact of cannabis legalization in Canadian workplaces. The ambiguity stems directly from the uncertainty surrounding the impairing qualities of cannabis (particularly with respect to the window of impairment) and the inability to precisely measure impairment levels, in contrast to the efficacy and validity of alcohol breathalyzer testing.

This uncertainty will continue to preclude the application of pre-employment and random drug testing in the workplace. Nevertheless, in accordance with *Entrop,* testing will be permissible in the context of determining cause following workplace accidents or near-misses, reasonable suspicions of impairment and return to work arrangements. However, given the fact that the presence of THC metabolites is not indicative of impairment,

[42] 2018 NLCA 45

employers must engage in a multi-faceted investigation. Cannabis impairment testing is simply too blunt of an instrument, even in circumstances where testing may be permissible.

Employers seeking to mitigate the risk of cannabis impairment and legal challenges to its policies are well advised to do the following:

- *PROHIBIT USE DURING WORK HOURS, INCLUDING BREAKS AND LUNCHES*

  Legislation prohibits use in the workplace and there is nothing authorizing impairment in the workplace. Given the acknowledgment that cannabis does impair, it is reasonable to prohibit use during breaks and lunches. The clear message from the Ontario Human Rights Tribunal is that impairment is assumed with use. Any prohibited use policy must, however, be subject to accommodation obligations under the *Code* given the needs of medicinal cannabis users.

- *REQUIRE DISCLOSURE*

  Anyone claiming a medical need for cannabis during working hours should disclose this need in order to permit the employer to mitigate risk and accommodate where necessary. The failure to disclose may attract discipline, despite any legitimate addiction issues.

- *AVOID ZERO TOLERANCE APPROACHES*

  Entrop instructs that automatic termination in response to cannabis use is *prima facie* discriminatory with respect to both addicts and casual users and not reasonably necessary to ensure workplace safety. Individualize assessment and case-by-case decision making is critical.

- *IMPLEMENT TESTING ALTERNATIVES*

  Testing is not the only solution for detecting impairment in the workplace. Performance and behavioural tests and objective observation tools may be equally effective, in conjunction with non-invasive investigative tools including interviews. Prudent employers concerned about the risk of cannabis impairment in the workplace will train supervisory staff to look for objective signs of impairment.

There are no longer prohibitions against the use of cannabis by anyone interested in its mind-altering effects. While fears of “reefer madness” are outdated and misplaced, concerns of impairment in functions that require full attention are real and justified. Our courts, tribunals and arbitrators are alive to the issue and will undoubtedly provide additional guidance in the months and years to come.